



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-75

v.

NJ Motor Vehicle Commission
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the government record request pursuant to OPRA for the list of all employees at the Egg Harbor Division of Motor Vehicle location by providing redacted records with only the first name and first letter of the last name of each employee. N.J.S.A. 47:1a-10; North Jersey Media Group, Inc. v. Bergen Cty. Prosecutor's Office, 405 N.J. Super. 386 (App Div. 2009). The Custodian must disclose the list without redactions.
2. **The Custodian shall comply with item # 1 above within five (5) business days from receipt of the Council's interim Order and simultaneously provide certified confirmation of compliance in accordance with Court Rule 1:4-4 to the Executive Director.**
3. The Custodian certified in the SOI that while employees at their field facilities are discouraged from providing their full names to members of the public as a matter of personal safety, there is no written policy which permits it and therefore no responsive record exists. Further there is no evidence on the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records. *See* Pusterhofer v. New Jersey Dept. of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Pursuant to Paff v NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the employee manual excerpts of policies on motor vehicle registration discounts and procedures for processing registration documents for SSI, Lifeline and PADD recipients to determine the validity of the Custodian's assertion that the excerpts constitute administrative or technical information regarding hardware, software and networks which if disclosed would jeopardize computer security, and also contain security measures and



techniques which if disclosed could create a risk of safety of persons, property, electronic data and hardware. N.J.S.A 47:1A-1.

5. **The Custodian must deliver¹ to the Council in a sealed envelope nine copies of the requested unredacted records (see #4 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis and determination of whether the Custodian knowingly and willingly violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Interim Order Rendered by the
Government Records Council
On The 28th Day of October, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 29, 2014

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-75

v.

**New Jersey Motor Vehicle Commission²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via email of:

1. List of all employees at Egg Harbor Division of Motor Vehicle (“DMV”) office.
2. The Motor Vehicle Commission (“MVC”) policy which permits employees to refuse to give their full name to the public.
3. DMV Policy on motor vehicle registration discounts
4. The Procedure for processing registration discounts for Supplemental Security Income (“SSI”), Lifeline and Pharmaceutical Assistance to the Aged & Disabled (“PADD”) recipients.³

Custodian of Record: Joseph F. Bruno

Request Received by Custodian: January 31, 2014

Response Made by Custodian: February 11, 2014

GRC Complaint Received: February 12, 2014

Background⁴

Request and Response:

On January 31, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 11, 2014 seven (7) business days after receipt of the request, the Custodian responded in writing to each item in the request. The Custodian provided redacted responses to one of the items, denied the existence of one of the items, and gave written descriptions of two of the other requested items but refused to provide the actual documents.

¹ No legal representation listed on record.

² Represented by Valentina M. DiPippo, Deputy Attorney General.

³ The Complainant requested additional records that are not relevant to this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On February 12, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on January 31, 2014 he submitted a request to the Custodian. He argued that the following records were denied.

1. List of all DMV employees at the Egg Harbor location.
2. The MVC policy which permits employees to refuse to give their first name to the public.
3. The DMV policy on registration discounts.
4. The DMV procedure for processing registration discounts for SSI, Lifeline and PADD recipients.

Statement of Information:

On March 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that in response to item # 1, he provided the Complainant with a list of employees at the Egg Harbor DMV office redacting all but the first names and first letter of the last names. With regard to item # 2, the Custodian certified that he advised the Complainant that there is no written policy which permits employees to refuse to give their full names to the public exists. With regard to items # 3 and # 4, the Custodian described the DMV policy on registration discounts and the procedures utilized to process discounts for SSI, Lifeline and PADD recipients; however, the Custodian denied the request for the written records which contain those policies and procedure.

In denying the request for items # 3 and # 4, the Custodian argued that the policies and procedures described in the SOI were based on excerpts from the MVC’s employee manual for field facility personnel; the excerpts from the manual constitute administrative or technical information regarding hardware, software and networks which if disclosed would jeopardize computer security, and also contain security measures and techniques which if disclosed could create a risk of safety of persons, property, electronic data and hardware. Accordingly the Custodian argued that denial of those excerpts from that document was justified as an exception as not being a government record as defined in N.J.S.A. 47:1A-1.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Item # 1: The full names of employees working at the Egg Harbor DMV office.

OPRA provides that:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access. . .

N.J.S.A. 47:1A-10.

When dealing with personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that. . .need to be considered.” Kowalski v. Somerset City Prosecutor’s Office, 206 N.J. 581, 594 (2011). The first exception is for “[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record”. N.J.S.A. 47:1A-10.

In North Jersey Media Grp. Inc. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386 (App. Div. 2009), the Appellate Division stated that the only personnel information a public entity is authorized to disclose are the specific items listed in N.J. S.A. 47:1A-10.

Here, the Complainant requested a list of all employees at the Egg Harbor DMV. New Jersey employees’ names are government records and must be disclosed under N.J.S.A. 47:1A-10. The Custodian denied the request, citing concerns of unjustified retaliation taken by disgruntled citizens. Accordingly, the Custodian disclosed to the Complainant a redacted record which provided only the first names and first letter of the last name. This is inconsistent with OPRA and the public’s right to certain personnel information of government employees. Furthermore, in his SOI, the Custodian acknowledged his obligation to disclose the full names, titles, positions and salaries of all state employees by stating that all employees’ names are listed on a State of New Jersey Public Website and that the MVC’s field agency locations are listed by Region. Thus the full names of the employees are not meant to be kept confidential. The GRC is not satisfied that the MVC can deny access to records in an effort to hide the exact location where an employee works.

Therefore, the Custodian unlawfully denied access to the government record request pursuant to OPRA for the list of all employees at the Egg Harbor DMV location by providing redacted records with only the first name and first letter of the last name of each employee. N.J.S.A. 47:1A-10; North Jersey Media Group, Inc. v. Bergen Cty. Prosecutor’s Office, 405 N.J. Super. 386 (App Div. 2009). The Custodian must disclose the list without redactions.

Item # 2. The MVC policy which permits employees to refuse to give their full names to the public

The Council has consistently found there to be no denial of access when a custodian demonstrates that no records responsive to a complainant’s request exist. In Pusterhofer v. New

Jersey Dept. of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. Id. The Custodian subsequently certified that no records responsive to the Complainant's request existed, and the Complainant submitted no evidence to refute said certification. Id. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed. Id.

Here, the Custodian certified in the SOI that while employees at their field facilities are discouraged from providing their full names to members of the public as a matter of personal safety, there is no written policy which permits it and therefore no responsive record exists. Further, there is no evidence on the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49.

Items # 3 and # 4: Policy on motor vehicle registration and procedure for processing registration discounts.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records ... When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court also stated that:

[T]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in

⁵ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian did not provide the records sought by the Complainant arguing that the excerpts from the employee manual constitute administrative or technical information regarding hardware, software and networks which if disclosed would jeopardize computer security, and also contain security measures and techniques which if disclosed could create a risk of safety of persons, property, electronic data and hardware. The Custodian stated that the manual contains “instructions” to DMV employees on how to review “identification documents and process requests for learner permits, driver licenses, titles and registrations.”

The Complainant contended that he did not seek explanations or discussions of the policies and procedures but records describing them and thus demanded copies of the actual written excerpts from the employee manual. The Custodian however argued that providing the manual or excerpts from the manual even with redaction would not sufficiently protect the process of the evaluation of identification documents by field agency employees, which could be used to obtain fraudulent permits, licenses, titles and registrations and will not adequately protect the MVC’S computer system.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the employee manual excerpts of policies on motor vehicle registration discounts and procedures for processing registration documents for SSI, Lifeline and PADD recipients to determine the validity of the Custodian’s assertion that the excerpts constitute administrative or technical information regarding hardware, software and networks which if disclosed would jeopardize computer security, and also contain security measures and techniques which if disclosed could create a risk of safety of persons, property, electronic data and hardware. N.J.S.A 47:1A-1.

Knowing and Willful

The Council defers analysis as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the government record request pursuant to OPRA for the list of all employees at the Egg Harbor Division of Motor Vehicle location by providing redacted records with only the first name and first letter of the last name of each employee. N.J.S.A. 47:1a-10; North Jersey Media Group, Inc. v. Bergen Cty. Prosecutor’s Office, 405 N.J. Super. 386 (App Div. 2009). The Custodian must disclose the list without redactions.

2. **The Custodian shall comply with item # 1 above within five (5) business days from receipt of the Council's interim Order and simultaneously provide certified confirmation of compliance in accordance with Court Rule 1:4-4 to the Executive Director.**
3. The Custodian certified in the SOI that while employees at their field facilities are discouraged from providing their full names to members of the public as a matter of personal safety, there is no written policy which permits it and therefore no responsive record exists. Further there is no evidence on the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. New Jersey Dept. of Educ.*, GRC Complaint No. 2005-49 (July 2005).
4. Pursuant to *Paff v NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the employee manual excerpts of policies on motor vehicle registration discounts and procedures for processing registration documents for SSI, Lifeline and PADD recipients to determine the validity of the Custodian's assertion that the excerpts constitute administrative or technical information regarding hardware, software and networks which if disclosed would jeopardize computer security, and also contain security measures and techniques which if disclosed could create a risk of safety of persons, property, electronic data and hardware. N.J.S.A 47:1A-1.
5. **The Custodian must deliver⁶ to the Council in a sealed envelope nine copies of the requested unredacted records (see #4 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis and determination of whether the Custodian knowingly and willingly violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Prepared By: Ernest Bongiovanni, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014.

⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.